

BRUCE MAYO ENNIS,)	
)	
Petitioner,)	3:04-cv-0714-RCJ-RAM
)	
vs.)	
)	ORDER
E.K. MCDANIEL, <i>et al.</i> ,)	
)	
Respondents.)	
)	
)	

I. Facts and Procedural Background

¹The exhibits cited in this order in the form “Exhibit ____,” are those filed by petitioner in support of his first amended petition for writ of habeas corpus, and are located in the record at docket #14, 15 and 16.

1 November 29, 1995 to December 4, 1995. Exhibits 4, 23, 26, 28-31. Petitioner was convicted of first
2 degree murder with the use of a deadly weapon and was acquitted of the second count. Exhibit 34.
3 Petitioner then entered into a guilty plea to count III. Exhibit 37. On January 18, 1996, the district court
4 sentenced petitioner to life imprisonment without the possibility of parole for count I, and to six years
5 in prison for count III. Exhibit 36. A judgment of conviction was entered on January 30, 1996. Exhibit
6 39.

7 Petitioner appealed, alleging that there was insufficient evidence to support his conviction
8 of first degree murder. Exhibit 40, 42. The Nevada Supreme Court dismissed the appeal, stating it could
9 not reassess the weight of the evidence or the credibility of the witnesses. Exhibit 44. Furthermore, the
10 court concluded that there was substantial evidence to support petitioner's conviction. *Id.* Remittitur
11 issued on January 21, 1998. Exhibit 45.

12 Petitioner then filed a state petition for a writ of habeas corpus, alleging (1) the Nevada
13 Supreme Court erred in reviewing his direct appeal, as no rational trier of fact could have found that the
14 essential elements of first degree murder were met beyond a reasonable doubt; (2) the trial court failed
15 to properly instruct the jury on the premeditation and deliberation elements of first degree murder; (3)
16 the reasonable doubt instruction improperly minimized the state's burden of proof; (4) appellate counsel
17 failed to raise issues two and three on appeal, (5) trial counsel was ineffective for failing to investigate
18 the victim's prior acts of violence; and (6) the cumulative errors require reversal of the judgment of
19 conviction. Exhibits 46 and 57. The district court denied the petition without holding an evidentiary
20 hearing. Exhibit 61. On appeal the Nevada Supreme Court affirmed the lower court's denial of the
21 petition. Exhibit 63. Remittitur issued on November 30, 2004.

22 Petitioner mailed his federal habeas corpus petition November 29, 2004 (docket #4). This
23 Court appointed counsel, and an amended habeas petition was filed (docket #3 and 13). Respondents
24 filed an answer to the petition and petitioner has filed a response (docket #26 and 32). On March 24,
25 2008 petitioner filed a motion for decision (docket #38).

II. Federal Habeas Corpus Standards

The Antiterrorism and Effective Death Penalty Act (“AEDPA”), provides the legal standard for the Court’s consideration of this habeas petition:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d).

The AEDPA “modified a federal habeas court’s role in reviewing state prisoner applications in order to prevent federal habeas ‘retrials’ and to ensure that state-court convictions are given effect to the extent possible under law.” *Bell v. Cone*, 535 U.S. 685, 693 (2002). A state court decision is contrary to clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254, “‘if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court’s] cases’” or “‘if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme Court’s] precedent.’” *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell*, 535 U.S. at 694).

A state court decision is an unreasonable application of clearly established Supreme Court precedent “‘if the state court identifies the correct governing legal principle from [the Supreme Court’s] decisions but unreasonably applies that principle to the facts of the prisoner’s case.’” *Lockyer*, 538 U.S. at 75 (quoting *Williams*, 529 U.S. at 413). The unreasonable application clause “requires the state court decision to be more than incorrect or erroneous”; the state court’s application of clearly established law

1 must be objectively unreasonable. *Id.* (quoting *Williams*, 529 U.S. at 409). See also *Ramirez v. Castro*,
2 365 F.3d 755 (9th Cir. 2004).

3 In determining whether a state court decision is contrary to, or an unreasonable
4 application of, federal law, this Court looks to a state court's last reasoned decision. See *Ylst v.*
5 *Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Plumlee v. Masto*, 512 F.3d 1204, 1209-10 (9th Cir. 2008)
6 (en banc). When a state court has not "explained its reasoning on a particular claim" the federal court
7 conducts "an independent review of the record to determine whether the court's decision was objectively
8 unreasonable." *Sass v. California Board of Prison Terms*, 461 F.3d 1123, 1127 (9th Cir. 2006) (citing
9 *Lewis v. Mayle*, 391 F.3d 989, 996 (9th Cir. 2004)).

10 Moreover, "a determination of a factual issue made by a State court shall be presumed
11 to be correct," and the petitioner "shall have the burden of rebutting the presumption of correctness by
12 clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

13 **III. Discussion**

14 **A. Ground One**

15 In his first claim for relief petitioner alleges that he is in custody in violation of his due
16 process rights under the Fifth and Fourteenth Amendments as the evidence adduced at trial was
17 insufficient to prove first degree murder beyond a reasonable doubt. Petitioner specifically argues that
18 the state relied on witnesses at trial who each had a motivation to lie.

19 The United States Supreme Court has held that when reviewing an insufficiency of the
20 evidence claim in a habeas petition, a federal court must determine "whether, after viewing the evidence
21 in the light most favorable to the prosecution, any rational trier of fact could have found the essential
22 elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The
23 court must assume that the jury resolved any evidentiary conflicts in favor of the prosecution, and the
24 court must defer to that resolution. *Jackson*, 443 U.S. at 326; *Schell v. Witek*, 218 F.3d 1017, 1023 (9th
25 Cir. 2000) (en banc). The credibility of witnesses is beyond the scope of the Court's review of the
26 sufficiency of the evidence. See *Schlup v. Delo*, 513 U.S. 298, 330 (1995). Under the *Jackson* standard,

1 the prosecution has no obligation to rule out every hypothesis except guilt. *Wright v. West*, 505 U.S.
2 277, 296 (1992) (plurality opinion); *Jackson*, 443 U.S. at 326; *Schell*, 218 F.3d at 1023. *Jackson*
3 presents “a high standard” to habeas petitioners claiming insufficiency of evidence. *Jones v. Wood*, 207
4 F.3d 557, 563 (9th Cir. 2000).

5 The Nevada Supreme Court ruled as follows on petitioner’s claim that there was
6 insufficient evidence to support his conviction:

7 Ennis argues that several of the State’s witnesses fabricated their
8 testimony, thereby suggesting that the jury’s verdict was not based on credible
9 or reliable evidence. Ennis contends that (1) several witnesses who testified on
10 behalf of the State did not dispute Ennis’ claim of self-defense until nine
11 months after the shooting, (2) Nix’s trial testimony contradicted earlier
12 statements made to the police, (3) Wheeler and Vaughan falsely denied that
13 they received reduced charges in unrelated drug offenses in exchange for their
14 testimony, and (4) Page’s testimony was unsupported by any evidence.

15 This case rested on the credibility of each of the witnesses, including
16 Ennis. Despite the credibility issues raised by Ennis, the jurors chose to accept
17 as true the testimony of the State’s witnesses. We conclude that Ennis is
18 inappropriately asking this court to reassess the weight of the evidence and pass
19 on the credibility of the witnesses. *See Lay*, 100 Nev. At 1192, 886 P.2d at
20 450. Furthermore, we have reviewed the record in this case and conclude that
21 substantial evidence exists to support the conviction of murder with the use of
22 a deadly weapon.

23 Exhibit 44.

24 This Court agrees with the conclusion of the Nevada Supreme Court. The court has
25 reviewed the record, and after viewing the evidence in the light most favorable to the prosecution,
26 concludes that any rational trier of fact could have found the petitioner guilty of first degree murder with
a deadly weapon. The Nevada Supreme Court’s ruling that there was sufficient evidence to support the
petitioner’s conviction was not contrary to, or an unreasonable application of, clearly established federal
law, as the issue of credibility of witnesses is beyond the scope of review. *Schlup v. Delo*, 513 U.S. 298,
330 (1995); *Bruce v. Terhune*, 376 F.3d 950, 957 (9th Cir. 2004). Moreover, the state court’s ruling was
not based on an unreasonable determination of facts in light of the evidence. 28 U.S.C. § 2254(d). The
court will deny habeas relief with respect to ground one.

1 **B. Ground Two**

2 In his second claim the petitioner asserts that the jury instructions defining premeditation
3 improperly minimized the state's burden of proof, thereby violating his due process rights under the
4 Fifth, Sixth and Fourteenth Amendments. The state district court gave the jury the following instruction
5 on premeditation and deliberation:

6 Premeditation is a design, a determination to kill, distinctly formed in the mind
7 at any moment before or at the time of the killing.

8 Premeditation need not be for a day, an hour, or even a minute. It may be as
9 instantaneous as successive thoughts of the mind. For if the jury believes from
10 the evidence that the act constituting the killing has been preceded by and has
been the result of premeditation, no matter how rapidly the premeditation is
followed by the act constituting the killing, it is willful, deliberate and
premeditated murder.

11 Exhibit 32. The Nevada Supreme Court found that while the jury instruction had been disapproved of
12 in *Byford v. State*, 994 P.2d 700 (Nev. 2000), there was sufficient evidence adduced at trial to establish
13 premeditation and deliberation. Exhibit 63.

14 The Nevada Supreme Court did not unreasonably apply federal law in affirming the
15 denial of this claim. Although the jury instruction was deemed to be improper pursuant to state law, the
16 court's determination that the error was harmless as there was sufficient evidence to prove premeditation
17 and deliberation is not objectively unreasonable in light of the evidence produced at trial. 28 U.S.C. §
18 2254(d). There was testimony at trial that the petitioner asked a friend for a gun because he intended
19 on killing his step-father. Exhibits 29, 30 and 31. Petitioner asserts that the witnesses were not credible,
20 therefore sufficient evidence did not exist to show premeditation and deliberation on his part. However,
21 as this Court has previously noted, assessment of the credibility of witnesses is for the jury and is beyond
22 the scope of this Court's review. Ground two will be denied.

23 . . .

24 . . .

1 **C. Ground Three**

2 In claim three the petitioner alleges that the trial court's reasonable doubt jury instruction
3 minimized the state's burden of proof and thereby violated his due process rights. At trial the district
4 court gave the jury the following instruction on reasonable doubt:

5 The Defendant is presumed innocent until the contrary is proved. This
6 presumption places upon the State the burden of proving beyond a reasonable
7 doubt every material element of the crime charged and that the Defendant is the
8 person who committed the offense.

9 A reasonable doubt is one based on reason. It is not mere possible doubt but
10 is such doubt as would govern or control a person in the more weighty affairs
11 of life. If the minds of the jurors, after the entire comparison and consideration
12 of all the evidence, are in such a condition that they can say they feel an abiding
conviction of the truth of the charge, there is not a reasonable doubt. Doubt to
be reasonable must be actual, not merely possibility or speculation.

13 If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to
14 a verdict of not guilty.

15 Exhibit 32. The Nevada Supreme Court, in affirming the trial court's denial of this claim, found that
16 the instruction given was identical to the language found in NRS 175.211, which the court had
17 previously held stated the proper definition of reasonable doubt and did not shift the state's burden of
18 proof. Exhibit 63.

19 While the Nevada Supreme Court relied on Nevada precedent, and not federal or United
20 States Supreme Court precedent, in affirming the denial of this claim, a state court is not required to
21 cite federal or United State Supreme Court cases, "so long as neither the reasoning nor the result of the
22 state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8 (2003) (per curiam). The
23 Nevada Supreme Court's decision is not an objectively unreasonable application of federal law.
24 Federal courts have previously upheld the same or similar Nevada jury instructions on reasonable
25 doubt. *See Nevius v. McDaniel*, 218 F.3d 940, 945 (9th Cir. 2000); *Ramirez v. Hatcher*, 136 F.3d 1209,
26 1213-14 (9th Cir. 1998) (citing *Victor v. Nebraska*, 511 U.S. 1 (1994)). Therefore it appears that the
jury instruction on reasonable doubt did not improperly minimize the state's burden of proof. Ground
three will be denied.

1 **D. Ground Four**

2 In ground four petitioner alleges that he is in custody in violation of his rights to
3 effective assistance of counsel under the Fifth, Sixth and Fourteenth Amendments. Petitioner contends
4 that trial counsel was ineffective for failing to investigate the victim's prior acts of violence. Moreover,
5 petitioner argues that appellate counsel was ineffective for failing to raise the issue of the trial court's
6 erroneous jury instructions on appeal.

7 In order to prove ineffective assistance of counsel, petitioner must show (1) that counsel
8 acted deficiently, in that his attorney made errors so serious that his actions were outside the scope of
9 professionally competent assistance and (2) the deficient performance prejudiced the outcome of the
10 proceeding. *Strickland v. Washington*, 466 U.S. 668, 687-90 (1984). "Claims of ineffective assistance
11 of appellate counsel are reviewed according to the standard announced in *Strickland*." *Turner v.*
12 *Calderon*, 281 F.3d 851, 872 (9th Cir. 2002)

13 **1. Ineffective Assistance of Trial Counsel**

14 Petitioner contends that trial counsel failed to investigate the victim's prior acts of
15 violence. Petitioner states that he advised his attorney that he had knowledge of previous incidents
16 where the victim had used a knife as a weapon. Moreover, petitioner alleges that he had told his
17 attorney that the victim had previously been arrested for battery and assault with a deadly weapon.
18 Petitioner states that investigation into these incidents and facts could have corroborated his version
19 of events, namely that the crime occurred in self defense as the victim was threatening petitioner with
20 a knife.

21 The Nevada Supreme Court, in affirming the denial of this claim, stated that the
22 petitioner failed to show that counsel was ineffective. Exhibit 63. The state court noted that the record
23 revealed that the petitioner did testify at trial that the victim threatened him with a knife. *Id.* Moreover,
24 the court found that several witnesses also testified that the victim had a violent character. *Id.* Finally
25 the court stated that petitioner failed to show that the outcome of the trial would have been different
26 had counsel not made any of the alleged errors. *Id.*

1 The state court's conclusion was not an unreasonable application of *Strickland*. The
2 factual findings of the state court are presumed correct and cannot be overturned unless this court
3 cannot "reasonably conclude that the finding is supported by the record." *Cook v. Schriro*, 516 U.S.
4 802, 816 (9th Cir. 2008); *Miller-El v. Cockrell*, 537 U.S. 32 (2003); 28 U.S.C. § 2254(e)(1). The
5 petitioner has not shown that the court's determination that his attorney did not perform deficiently is
6 unreasonable in light of the evidence presented.

7 **2. Ineffective Assistance of Appellate Counsel**

8 Petitioner next claims that appellate counsel was ineffective for failing to raise the issue
9 of the trial court's erroneous jury instructions (as discussed in grounds two and three) on direct appeal.
10 The Nevada Supreme Court determined that the petitioner failed to show that the issue of whether the
11 trial court gave an improper instruction on reasonable doubt had a likelihood of success on the merits.
12 Exhibit 63. The court then stated that petitioner did not show that appellate counsel was deficient in
13 failing to raise the issue of the use of improper jury instructions on premeditation and deliberation. *Id.*

14 The Nevada Supreme Court did not unreasonably apply federal law. As is noted above
15 in relation to ground two, the state court's determination that the reasonable doubt jury instruction was
16 proper was not an objectively unreasonable application of federal law. Moreover, the state court's
17 finding that any error was harmless with respect to the premeditation and deliberation instructions also
18 was not unreasonable. In turn, the state court's finding that appellate counsel was not ineffective and
19 there no likelihood of success on the merits had these issues been raised on direct appeal also was not
20 an objectively unreasonable application of federal law. Appellate counsel is not required to raise
21 meritless issues or issues that have little chance of success on appeal. *Turner v. Calderon*, 281 F.3d
22 851, 872 (9th Cir. 2002).

23 This Court will deny ground four.

24 **E. Ground Five**

25 In petitioner's fifth claim he alleges that he is entitled to relief due to the cumulative
26 effect of the errors previously mentioned. The cumulative error doctrine recognizes that the cumulative

1 effect of several errors may prejudice a defendant. *See, e.g., United States v. Frederick*, 78 F.3d 130,
 2 1381 (9th Cir. 1996). “However, where there is no single constitutional error existing, nothing can
 3 accumulate to the level of a constitutional violation.” *Fuller v. Roe*, 182 F.3d 699, 704 (9th Cir. 1999),
 4 *overruled on other grounds, Slack v. McDaniel*, 529 U.S. 473 (2000). The state court determined that
 5 no errors were present in the petitioner’s case. That determination is not objectively unreasonable, as
 6 this Court has found no constitutional error. The cumulative error doctrine cannot be applied to find
 7 constitutional error where no errors exist. Furthermore, any of the *alleged* errors, if taken
 8 cumulatively, would not warrant habeas corpus relief. Ground five shall be denied.

9 **IV. Certificate of Appealability**

10 In order to proceed with an appeal from this court, petitioner must receive a certificate
 11 of appealability. 28 U.S.C. § 2253(c)(1). Generally, a petitioner must make “a substantial showing of
 12 the denial of a constitutional right” to warrant a certificate of appealability. *Id.* The Supreme Court
 13 has held that a petitioner “must demonstrate that reasonable jurists would find the district court’s
 14 assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484
 15 (2000).

16 The Supreme Court further illuminated the standard for issuance of a certificate of
 17 appealability in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). The Court stated in that case:

18 We do not require petitioner to prove, before the issuance of a COA, that
 19 some jurists would grant the petition for habeas corpus. Indeed, a claim
 20 can be debatable even though every jurist of reason might agree, after
 21 the COA has been granted and the case has received full consideration,
 22 that petitioner will not prevail. As we stated in *Slack*, “[w]here a district
 court has rejected the constitutional claims on the merits, the showing
 required to satisfy § 2253(c) is straightforward: The petitioner must
 demonstrate that reasonable jurists would find the district court’s
 assessment of the constitutional claims debatable or wrong.”

23 *Id.* at 1040 (quoting *Slack*, 529 U.S. at 484).

24 The court has considered the issues raised by petitioner, with respect to whether they
 25 satisfy the standard for issuance of a certificate of appeal, and the court determines that none meet that
 26 standard. The court will therefore deny petitioner a certificate of appealability.

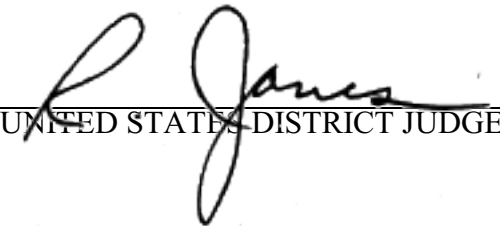
1 **IT IS THEREFORE ORDERED** that petitioner's motion for decision (docket #38)
2 is **GRANTED**.

3 **IT IS FURTHER ORDERED** that the petition for a writ of habeas corpus (docket #13)
4 is **DENIED**.

5 **IT IS FURTHER ORDERED** that the clerk shall **ENTER JUDGMENT**
6 **ACCORDINGLY**.

7 **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF**
8 **APPEALABILITY**.

9 Dated this 4th day of June, 2008.

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11 
12 UNITED STATES DISTRICT JUDGE
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